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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-144

WEST TENNESSEE ACLU, *et al.*,

Petitioners,

—v.—

CITY OF MEMPHIS, TENNESSEE and HENRY LOEB, Mayor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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OCTOBER TERM, 1972

No. .....

WEST TENNESSEE ACLU, *et al.*,

Petitioners,

—v.—

CITY OF MEMPHIS, TENNESSEE and
HENRY LOEB, Mayor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 25, 1972, reversing the decision of the United States District Court for the Western District of Tennessee and directing the dismissal of petitioners' complaint.

Opinions Below

The per curiam decision of the Court of Appeals for the Sixth Circuit is reported at 454 F.2d 1162 and is set forth in the Appendix, *infra* at pp. 1a-3a. The decision of the United States District Court is reported at 323 F. Supp. 234 and is set forth in the Appendix, *infra* at pp. 5a-15a.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 25, 1972. On March 27, 1972 a timely-filed petition for rehearing and rehearing *en banc* was denied, two Judges dissenting. By order dated June 7, 1972, Mr. Justice Stewart extended the time for filing a petition for certiorari to and including July 25, 1972.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the abstention doctrine may be invoked to dismiss a civil rights action raising substantial federal questions after a District Court has granted judgment to the plaintiffs based in part upon an issue of state law raised *sua sponte* by the District Court.

2. Whether a mayor may constitutionally make city hall office space available to private groups pursuing "patriotic purposes" while denying it to groups which he considers "against our country's interests."

Constitutional and Statutory Provisions

First Amendment; Fourteenth Amendment.

Statement of the Case

The historical facts in this case, as found by the District Court (App., *infra*, pp. 5a-7a), are essentially undisputed.

On or about January 8, 1971, the Mayor of the City of Memphis, Tennessee instituted a program wherein unused office space in the Memphis City Hall would be made available by him, without charge, to any organization which the Mayor considered to be "worthwhile and in the community's interest." Pursuant to this program, the Mayor made office space available to an organization known as "Memphians for Patriotism", a group chartered for purposes which included assistance to prisoners of war and persons missing in action in Vietnam.

One week later, by letter dated January 13, 1971, the petitioner Selective Service Counseling and Information Association requested that the Mayor likewise permit its members to use available office space in city hall. The Mayor replied that he did not feel that the purposes of the petitioner organization were consistent with his program and that "such space will not be used [in a manner] which I consider to be against the country's interests . . . " The Mayor refused to make City Hall space available to the organization.

On January 26, 1971 the City Council passed a resolution expressing its feeling that municipal office space should only be made available to governmental agencies, but it took no action to restrict the Mayor's policies or actions.

Two days later the petitioners, organizations and individuals, filed this action pursuant to the civil rights

statutes, 28 U.S.C. Section 1343(3); 42 U.S.C. Section 1983. They asked for declaratory and injunctive relief, claiming that the Mayor's policy contravened the First Amendment and offended the principles of due process and equal protection. The petitioners made no claim that the Mayor's actions were illegal as a matter of state law; nor did they call into question the validity of any state statute, ordinance or regulation. The respondents' answer asserted that other public places were available to the petitioners, that the Mayor's municipal responsibilities included the encouragement of patriotism, and that he had discretion to allocate the use of unused space for public purposes.

Following an evidentiary hearing, the District Court issued its decision on February 19, 1971. Although the parties had raised no issue as to the "legality of the Mayor's actions in allowing a non-governmental organization to utilize City Hall space" the court felt it necessary to consider that issue prior to discussing the constitutional claims (App., *infra*, p. 7a). Surveying treatises on municipal corporations and analyzing Tennessee common law, the court decided that space could not be made available to non-public groups absent express statutory authority (App., *infra*, pp. 7a-11a). Finding none, the court declared that neither "Memphians for Patriotism" nor the petitioner organizations could use such space (App., *infra*, pp. 11a-13a). The court went on to discuss the constitutional claims, observing that the Mayor's actions were "certainly questionable" (App., *infra*, pp. 13a-14a). For the time being, injunctive relief was denied (App., *infra*, p. 15a).

However, the Mayor persisted in making office space available to the patriotic group on an exclusive basis and

refusing to allow other groups to utilize the space. (App., *infra*, p. 17a). Accordingly, the court held a subsequent hearing and concluded that the Mayor's actions were unconstitutional:

> The failure of the defendants to adhere to these [constitutional] standards and requirements over a period of months, leads the Court to conclude reluctantly that it should enjoin such continued use, which is felt not only to be unlawful but in contravention of the constitutional rights asserted in the complaint under such circumstances. (App., *infra*, p. 17a).

A preliminary injunction issued enjoining the respondents from allowing "Memphians for Patriotism" or similar organizations to use office space.

The respondents appealed to the Sixth Circuit. In a *per curiam* decision that court, relying solely on dictum in *Reetz* v. *Bozanich*, 397 U.S. 82 (1970), held that since the case "presents an issue which may be controlled by the laws of the State of Tennessee . . . the District Court should have dismissed the action and permitted the parties to resort to the state courts for any relief . . . " (App., *infra*, p. 2a). The decision of the District Court was reversed.

It is to review this judgment that petitioners seek certiorari.

REASONS FOR GRANTING THE WRIT

I.

The ruling below is in conflict with decisions of this Court governing the proper application of the abstention doctrine.

The Sixth Circuit improperly invoked the abstention doctrine to direct the dismissal of a civil rights action seeking to vindicate primary constitutional rights in a case where the District Court had proceeded to a judgment on the merits in the plaintiffs' favor, albeit a decision primarily founded upon the illegality of the respondents' conduct under state law. The decision below reflects a disturbing tendency of some federal courts to utilize the uncertainties inherent in the abstention doctrine as a method for refusing to adjudicate important, federally-protected civil rights. The Court should grant certiorari to provide guidance to courts and litigants concerning the proper application of the doctrine in cases of this kind.

As this Court has frequently explained, abstention is "a judge-made doctrine . . ., first fashioned in 1941 in *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, [that] sanctions . . . escape [from immediate decision] only in narrowly limited 'special circumstances' . . . justifying the delay and expense to which application of the abstention doctrine inevitably gives use . . ." *Lake Carriers' Association* v. *MacMullen*, —— U.S. ——, 40 U.S. Law Week 4569, 4572 (1972). It is a discretionary device invoked to serve a variety of purposes associated with federalism:

> In applying the doctrine of abstention, a federal district court is vested with discretion to decline to

> exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law. . . . Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. . . . The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. *Harman* v. *Forssenius,* 380 U.S. 528, 534 (1965).

The "paradigm" case for invocation of the abstention doctrine is the situation where a state statutory arrangement is challenged, and there is the possibility that state court construction of the statute will alter or perhaps moot the constitutional challenge to it. *Lake Carriers' Association* v. *MacMullen, supra,* at 4573. Indeed, most of the abstention cases before this Court have involved challenges to statutes, a context in which the policies of the doctrine have relevance and force. E.g., *Reetz* v. *Bozanich, supra* (state fishing statutes); *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41 (1970) (commercial regulation statute); *Askew* v. *Hargrave,* 401 U.S. 476 (1971) (school tax law). In such cases, the claimed federal right is entangled in the state statutory web which must be definitively unraveled before the primary constitutional issue can be adjudicated.

By contrast, the instant action called into question the validity of no statutory or regulatory arrangement of the

State of Tennessee or even the City of Memphis. Indeed, none are even applicable. Rather, it challenged the constitutional legitimacy of an *ad hoc* policy adopted by the mayor of a municipality, a policy reminiscent of an earlier era in our municipal and constitutional history. Cf. *Hague* v. *Committee For Industrial Organization,* 307 U.S. 496 (1939). There was no pending litigation in the state courts which might have obviated the need to resolve the federal constitutional issues. Compare, *Askew* v. *Hargrave, supra.* Nor, indeed, did the respondents request that the court abstain. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 328-29 (1964).

The issue of state law which the District Court initially thought to be dispositive of the litigation was a matter of Tennessee common law. It was not an issue which involved any manifest, strong public policy; nor was it even raised by either side. In effect, the District Court held that the mayor's actions were *ultra vires.* Yet *ultra vires* issues can potentially be raised in most lawsuits challenging *ad hoc* administrative actions of state officials. See *Church* v. *Board of Education,* 339 F. Supp. 538, 540 (E.D. Mich. 1972). If the mere presence of such an issue can defeat federal jurisdiction, then most civil rights act suits will be subject to summary dismissal. Such a result, achieved below, is in direct conflict with this court's teaching that in civil rights actions it is "immaterial whether [the officials'] conduct is legal or illegal as a matter of state law." *McNeese* v. *Board of Education,* 373 U.S. 668, 674 (1963).

The Court of Appeals reached such a result by confusing the effects of abstention with the prerequisites for its invocation, none of which were met here. And unless the

"special circumstances" for abstention exist, then the suitor's choice of forum must be respected. *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967).

In sum, the decision below was not justified by the policies underlying the abstention doctrine.[1]

But beyond that, this misapplication of the abstention doctrine reflects a disturbing tendency to utilize it as a device for avoiding the exercise of federal jurisdiction in civil rights act cases. The doctrine itself seems to contain some inherent uncertainties as to its proper application. *Compare, Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) *with, Lake Carriers' Association* v. *MacMullen, supra.* Indeed the Second Circuit, after surveying this Court's abstention law, has suggested that the last two Terms "have witnessed the rejuvenation of the full implications of the *Pullman* doctrine." *Reid* v. *Board of Education of The*

[1] Not only was the decision below an improper use of the abstention doctrine, but it ignored the strong policies underlying the federal courts' exercise of pendent jurisdiction over state law claims. For, even assuming that the *ultra vires* claim had been affirmatively raised by the petitioners in their complaint, there would be no question that the District Court would have had jurisdiction to hear and adjudicate it. See *Siler* v. *Louisville & Nashville R.R.*, 213 U.S. 175 (1909); *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Moreover, pendent jurisdiction over state law claims is available in suits brought under the civil rights act. *Whirl* v. *Kern*, 407 F.2d 781, 793-96 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969). So long as the federal claim which confers jurisdiction over the case is substantial—and it certainly is here—and the state claim arises out of the same "nucleus of operative fact," then the state claim should be heard. *United Mine Workers* v. *Gibbs, supra.* And pendent jurisdiction should particularly be sustained once the District Court has reached a final adjudication on the merits of the state law issue, expending the time and energy necessary to do so. Cf., *Rosado* v. *Wyman*, 397 U.S. 397, 405 (1970). Judicial energy has been squandered not conserved by the decision below.

City of New York, 453 F.2d 238, 242 (2d Cir. 1971). A consequence of the seeming uncertainties as to the present reach of the doctrine and the apparent discretion with which it can be applied, has been the rendering of inconsistent decisions within the same Circuit, *compare,* the instant case, *with Garvin* v. *Rosenau,* 455 F.2d 233 (6th Cir. 1972) or even the same district, *compare, Church* v. *Board of Education, supra, with Alberda* v. *Noell,* 322 F. Supp. 1379 (E.D. Mich. 1971).[2]

Such uncertainty must be clarified, and the proper bounds of the doctrine defined. Most importantly, this Court must reaffirm the rule that "cases involving vital questions of civil rights are the least likely candidates for abstention." *Wright* v. *McMann,* 387 F.2d 519, 525 (2d Cir. 1967).

II.

The decision below, which allows municipal officials to make public facilities available only to groups whose viewpoints are approved, is totally inconsistent with this Court's decisions.

The Mayor of Memphis made public office space available to a group of citizens pursuing patriotic purposes. He denied such facilities to other groups because he did not feel their programs were "worthwhile and in the community's interest." Such official action is blatantly violative of this Court's teachings.

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[2] *Garvin* was a civil rights action involving First Amendment claims of high school students. The District Court invoked the abstention doctrine, and the Sixth Circuit reversed, noting that the possible existence of a state law, *ultra vires* claim cannot defeat federal jurisdiction. 455 F.2d at 238, n. 5. The panel's efforts to distinguish the instant case, *ibid.,* are less than persuasive.

Petitioners need not belabor the unconstitutionality of the respondents' policy. Just last month this Court reaffirmed the principle that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of the City of Chicago* v. *Mosley*, —— U.S. ——, 40 U.S. Law Week 4877, 4878 (1972).

The kind of flagrantly lawless official conduct challenged here cannot be afforded even the implicit approval which the decision below allows.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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July 24, 1972

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1267

WEST TENNESSEE ACLU *et al.*,

Plaintiffs-Appellees,

v.

CITY OF MEMPHIS, TENNESSEE and HENRY LOEB, Mayor of Memphis, Tennessee,

Defendants-Appellants.

Appeal from the United States District Court, Western District of Tennessee, Western Division.

Decided and Filed January 25, 1972.

Before:

BROOKS, MILLER and KENT,

Circuit Judges.

PER CURIAM.

The defendants-appellants bring this appeal from the order of the District Court restraining them from making an office in the Memphis City Hall available to a group known as "Memphians for Patriotism." The parties will be referred to as in the Court below. The defendant, Mayor

of Memphis, upon learning that there was a vacant office in the Memphis City Hall made it available to a group described as "Memphians for Patriotism," and announced that the office would be available to other patriotic groups. The plaintiff, Selective Service Counseling and Information Association, sought the use of the office which was denied by the Mayor because he did not consider the plaintiff organization "worthwhile and in the community interest."

Thereafter, the plaintiffs instituted this action for declaratory judgment and injunctive relief under 42 U.S.C. § 1983. The plaintiffs claim that the Selective Service Counseling and Information Association should be granted equal rights to the use of the office in question.

After hearing the District Court concluded that under Tennessee law the Mayor was not permitted to allow a non-governmental organization to occupy space in a municipal building absent statutory or charter authority giving it the right to do so. This issue was not presented by any of the pleadings in the case. The Trial Court's decision was based entirely upon Tennessee Law, although there is some passing reference to the plaintiffs' Civil Rights in the order for injunction. We neither accept or reject the District Judge's conclusion that occupancy of an office in the Memphis City Hall by Memphians for Patriotism was a violation of the laws of the State of Tennessee. It does appear that this case presents an issue which may be controlled by the laws of the State of Tennessee. Under those circumstances the District Judge should have dismissed the action and permitted the parties to resort to the state courts for any relief because: "A state court decision here, however, could conceivably avoid any decision under the

Fourteenth Amendment and would avoid any possible irritant in the Federal-State relationship." *Reetz* v. *Bozonich*, 397 U.S. 82, 86, 87 (1970).

The judgment of the District Court is reversed.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1267

WEST TENNESSEE ACLU *et al.*,

Plaintiffs-Appellees,

v.

CITY OF MEMPHIS, *et al.*,

Defendants-Appellants.

ORDER

Before:

McCREE, MILLER and KENT,

Circuit Judges.

Appellees' petition for rehearing having come on to be considered and of the Judges who are in regular active service only Judges Edwards and McCree having favored ordering consideration en banc,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT
JAMES A. HIGGINS
Clerk

Filed
Mar. 27, 1972
JAMES A. HIGGINS
Clerk

Opinion of the United States District Court for the Western District of Tennessee

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

CIVIL ACTION NO. C-71-44

WEST TENNESSEE ACLU; SELECTIVE SERVICE COUNSELING AND INFORMATION ASSOCIATION; RICHARD M. MOON and WILLIAM M. JENNINGS, individually and as Members of Selective Service Counseling and Information Association; NAACP, MEMPHIS BRANCH, LEROY CLARK, President, and MAXINE SMITH, Executive Secretary of NAACP, Memphis Branch,

Plaintiffs,

v.

CITY OF MEMPHIS, TENNESSEE, and HENRY LOEB, Mayor of Memphis, Tennessee,

Defendants.

OPINION

Plaintiffs, including members of Selective Service Counseling and Information Association (an unchartered and unincorporated group) bring this action under 42 U.S.C., Section 1983, seeking a preliminary injunction to

restrain defendants, the City of Memphis and its Mayor, from denying them the use of office space in the Memphis City Hall. Plaintiffs contend that the Court has jurisdiction of the cause under 28 U.S.C., Section 1343(3).

On or about January 8, 1971, the Mayor of the City of Memphis instituted a program wherein unused space in the Memphis City Hall would be made available by him, without charge, to any organization which the Mayor considered to be "worthwhile and in the community's interest". Pursuant to this program, the Mayor made available to an organization known as "Memphians for Patriotism," a group chartered for purposes, among other things, to assist prisoners of war and those missing in action in the Vietnam War. Evidence at the hearing disclosed that at the time it moved into City Hall this organization apparently had utilized space elsewhere. By letter dated January 13, 1971, plaintiff, Selective Service Counseling and Information Association through one of its members, Reverend Richard M. Moon, requested that defendant Mayor Henry Loeb of the City of Memphis likewise permit them to use available office space in City Hall. The Mayor replied that he did not feel the purposes of the plaintiff organization were consistent with his program and that "such space will not be used (in a manner) which I consider to be against our country's interests . . . if counseling and information is required by the various draft boards, then I suggest you take this matter up with them directly" (matter in parentheses added). The Mayor refused to make City Hall space available to plaintiff organization. He indicated at the hearing on this application for injunction that at the present time there is no other available space in City Hall which is not now being used for City governmental purposes.

On January 26, 1971, the Memphis City Council adopted a resolution by a majority vote which conveyed its feeling that City Hall space should be restricted to use by governmental bodies. The Council noted, however, that the resolution, in fact, placed no limitations on the Mayor, and did not attempt a disposition of the question of use by "Memphians for Patriotism". It is the contention of the plaintiffs that their rights of freedom of expression and equal protection of the laws, secured by the First and Fourteenth Amendments to the United States Constitution, have been violated by this action of the Mayor and the City of Memphis in providing City Hall space on the basis of personal and arbitrary whim and the Mayor's own agreement or disagreement with the views and ideals held by the organization or persons seeking such space.

On the other hand, the defendants assert that there is no constitutional question involved and that the Mayor's patriotic program is a lawful governmental purpose in pursuit of which the Mayor in his discretion may legally make City Hall space available as in this instance, free of charge, to "Memphians for Patriotism".

Although the respective parties to this action raise no issue in the pleadings as to the legality of the Mayor's action in allowing a non-governmental organization to utilize City Hall space, the Court feels that such an inquiry must first be made to determine the rights of the parties and other prospective non-governmental users under similar circumstances.

In 64 C.J.S., *Municipal Corporations,* Section 1808 (1950), the general law on this question of use of public space is set out at p. 282:

> ". . . (P)ublic buildings are held for public use, and a municipal corporation has no proprietary rights in the

buildings distinct from its trust for the public. So a municipality cannot appropriate public buildings to other than a public use without special legislative sanction, and it may be without power to use public buildings to carry on a private business for profit."

In a like vein, the rule is stated in 63 C.J.S., *Municipal Corporations,* Section 962 (1950):

"Ordinarily a municipal corporation may sell or otherwise dispose of property held for private or proprietary purposes, but may not do so in respect of property held for public or governmental purposes unless authorized by law."

See 38 Am. Jur. *Municipal Corporations,* Section 489 which contains the following language at pp. 168-69:

"It has frequently been stated broadly that municipal corporations have no power to rent municipal property to private persons, in the absence of a charter provision or statutory enactment empowering them to do so either in express terms or by necessary intendment . . . (A municipal corporation) cannot without express legislative authority lease for private purposes or for compensation property held by it for public and governmental purposes and actually devoted to such uses."

Similar principles are reiterated in 10 McQuillan Municipal Corporations, Section 28.42 at pp. 115-16, 119:

"Unconditional private uses (of public property) are not favored, especially where specific legislative authorization therefor is lacking . . . (O)rdinarily, a mu-

nicipality cannot by lease or license permit its property acquired or held for public use, to be wholly or partly diverted to a possession or use exclusively private, without specific legislative authority."

Tennessee Courts have indicated their approval of the above principles of law. It appears to be the law in Tennessee that a municipality cannot rent or otherwise make available to private persons municipal property, in the absence of a charter provision or statutory enactment.

This proposition was aptly illustrated by the Tennessee Supreme Court in *Shelby County* v. *Memphis Abstract Co.*, 140 Tenn. 74, 84, 203 S.W. 339, 342:

"We fail to find any statutory power granted to the quarterly county court or to the county commissioners of Shelby County to lease any part of the space in the offices designated for the use of county officials, and we think it is clear that no such authority exists. The power, if existent, on exercise would give the lessee the right to control the space leased to him or it to the exclusion of other members of the public, and the leases could be multiplied, resulting in the serious embarrassment of others whose rights to use the registry rooms and equipment cannot be denied.

In the absence of statutory authority no part of the rooms in current use as a registry of deeds and as part of a courthouse may be leased to be used for a period of months or years for private purposes. County buildings and their equipment are public property held by the county, but in trust for the public use. 7 R.C.L., p. 948; *State* v. *Hart,* 144 Ind., 107, 43 N.E., 7, 33 L.R.A., 118, and note; *Decatur* v. *DeKalb County,* 130 Ga., 488, 61 S.E., 23."

Shelby County v. *Memphis Abstract Co., supra* was cited with approval by the Tennessee Court of Appeals in *Warren* v. *Bradley,* 39 Tenn. App. 458, 284 S.W.2d 698 (1955) (cert. den.), in stating:

> "We might cite a large number of cases to the effect that it is universally recognized that municipal corporations can exercise no powers which are not in express terms, or by reasonable intendment, conferred upon them, and hence have no power to rent municipal property to private persons, in the absence of a charter provision or statutory enactment empowering them to do so either in express terms or by necessary implications."

See also *Henry* v. *Grainger County,* 154 Tenn. 576 (1926) where part of courthouse lawn was not permitted to be leased to a private individual. Also see *Board of Directors* v. *Bodkin Brothers,* 108 Tenn. 700, 706 (1901).

State ex rel. Scott v. *Hart,* 144 Ind. 107 (1896) also confirmed this precept:

> "We think it clear, both upon principle and authority, that the boards of commissioners in this state have no power to rent the courthouse, or any part of it, for private use, and that the relation of landlord and tenant cannot exist between the county and any private person as to the courthouse . . ."

To same effect: *Hilgers* v. *Woodbury County,* 200 Iowa 1318, 206 N.W. 660 (1925). It seems clear from the above authority that before the City of Memphis can allow a non-governmental organization to use space in a municipal building such as City Hall, there must be statutory or char-

ter authority, expressly or impliedly, giving it the right to do so.

No such legislative authority has been demonstrated by the parties, nor has the Court been able to find such authority. In the absence of any such statutory enactment enabling the Mayor or any other city government official or body to allow Memphis City Hall to be used as an office by private, non-governmental groups, no matter how laudatory their purposes may be, the Court concludes that such use is without legal authority.

Memphis has express statutory authority under Section 490 of its Charter to construct and maintain buildings for its celebration and promotion of the Cotton Carnival "and other civic or public organizations for like purposes." This is a far cry from authority to give or rent a portion of City Hall to some non-governmental organization at the discretion of the Mayor. Likewise, under Tennessee statute, T.C.A. 12-229 through 12-234, a municipality may have under limited conditions authority to sell and convey title to or lease property or buildings to "not for profit corporations" where they are "in the interests of the municipality in the judgment of the governing body," but this relates to financing of new improvements and structures for such limited purposes.

The Court also is of the opinion there is no inherent constitutional right to compel public officials to open municipal buildings to the public for use as an office even in the exercise of free speech and assembly. *Bynum* v. *Schiro,* 219 F.Supp. 204 (E.D. La., 1963); *Danskin* v. *San Diego Unified School Dist.,* 28 Cal.2d 536, 171 P.2d 885 (1946); *State* v. *City of Spokane,* 330 P.2d 718 (Wash., 1958). This is a different privilege entirely from the rights guaranteed under the First and Fourteenth Amendments to the exer-

cise of free speech and assembly without unlawful abridgement in public places, streets, parks, and halls by private individuals or groups.

We respectfully reject the defendants' argument that the Mayor's program of patriotism, by its very nature, is in effect a public purpose or governmental function, and consequently requires no legislative authority for use of City Hall space. "Public purpose" has been appropriately defined in *Pack* v. *Southern Bell Telephone & Telegraph Co.,* 215 Tenn. 503, 515, 516, 387 S.W.2d 789, 794 (1965) (quoting the 1958 Minnesota case of *Minneapolis Gas Co.* v. *Zimmerman,* 253 Minn. 164, 91 N.W.2d 642):

> "What is a 'public purpose' that will justify the expenditure of public money is not capable of a precise definition, but the Courts generally construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is *directly related* to the functions of government." (emphasis ours)

The Court is of the opinion that the activities of "Memphians for Patriotism" cannot be appropriately classified as a "public" or "governmental" purpose. At the same time, the Court is mindful of the City's express authority to devote public funds or property to patriotic functions in the form of appropriate war memorials and commemorations. 37 Am. Jur., *Municipal Corporations,* Section 128; 30 A.L.R., 1035; *Kingman* v. *Brockton,* 153 Mass. 255, 26 NE 998, *Hill* v. *Roberts,* 142 Tenn. 215 (1919); see also Charter and Related Laws, Memphis, Section 858 entitled *War Memorial.* Such buildings, statues and commemorations, however, are in our judgment distinguishable from

the use of City Hall by the organization involved in the case at bar. Doubtless the purposes and objective of "Memphians for Patriotism" are worthy and the Court does not hereby impugn the motives of the Mayor in making City Hall space available to this group. "Memphians for Patriotism", as has been pointed out, is essentially a private welfare corporation organized for specific reasons which have no direct or necessary relation to the functions of government of the City of Memphis. In the same context, neither the West Tennessee ACLU nor the NAACP (Memphis Branch) nor do the other plaintiffs have such direct and necessary relation, in our opinion, to the functions of government of the City of Memphis that this Court may enjoin the City from denying them office space in City Hall.

The declaratory judgment rendered by this Court does not mean that no organization or person other than City officials or employees will be able to use available City Hall space, nor should it be so interpreted. It is the Court's judgment that such organizations or groups must be of a nature as to be classified as in their essential and primary character "governmental" or "public purpose" in order to be entitled to utilize space in Memphis City Hall.

Had the Mayor the authority to permit non-governmental, private use of municipal property and had he properly exercised that authority, there would be an obligation to make available space with due regard to the constitutional rights of those seeking such space without unjust discrimination. Neither the City nor the Mayor under such circumstances could deny plaintiff nor others with similar standing the "equal protection of the laws". The Court has found, however, neither Tennessee statutes nor Memphis municipal ordinances give the Mayor such discretion and authority; and, consequently, it is not necessary to consider and declare whether or not plaintiffs' rights have been violated

under the facts and circumstances present in the record. The City of Memphis under appropriate statutory authority to make its City Hall, or any portion of it available for non-governmental purposes, might make and publish appropriate regulations governing the conditions, restrictions, and circumstances of such use provided they were non-discriminatory and provided they did not "confine expression of sentiments to those officially approved", *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969). Such regulations relating to use of City Hall by private groups or organizations, if adopted, must not be of such character that rights of free speech would be effectively denied. *Terminello* v. *Chicago,* 337 U.S. 1 (1949); *Cox* v. *Louisiana,* 379 U.S. 559 (1965); *Thomas* v. *Collins,* 323 U.S. 516 (1945); *Brown* v. *Louisiana,* 383 U.S. 131 (1966). It is certainly questionable that the Mayor, or any single official, might determine, for the City, based on his subjective opinion alone, whether one private organization or another may enjoy public facilities, even if purported statutory authority were in effect for this purpose. *Wolin* v. *Port of New York Authority,* 392 F.2d 83, 93 (1968). This would involve the necessity of affording all groups in comparable situations equal protection of the laws—*Bynum* v. *Schiro, supra.*

In summary, the Court finds that the law and authority is to the effect, as stated in the U. S. Supreme Court case of *Meriwether* v. *Garrett,* 102 U.S. 472 (1880):

> "In its . . . courthouses, and other public buildings, the (municipal) corporation has no proprietary rights distinct from the trust for the public. It holds them for *public use,* and to *no other* use can they be appropriated without *special* legislative sanction. It would be a perversion of the trust to apply them to other uses."
>
> (words in parenthesis and emphasis added)

The Court finds, moreover, no special legislative sanction for the permission given by the Mayor of the City of Memphis for office space in City Hall by "Memphians for Patriotism". Neither is there such sanction for use by plaintiff organizations at the present time.

This is the status of the matter despite the Court's recognition that under the Fourteenth Amendment "a municipality cannot deny the use of a public building to one organization while permission is freely granted to others applying for the purpose of public assembly and discussion." *Ellis* v. *Dixon,* 349 U.S. 458. The Court does not consider on this record that the City of Memphis has, in effect, denied the use of City Hall for public assembly and discussion; it has denied the plaintiff organizations and a similar organization use of City Hall office space. In our judgment, the City should likewise properly have denied that office space to "Memphians for Patriotism," because it has no special legislative sanction or authority to do so.

An injunction will therefore not be issued as prayed for by plaintiffs. The cause will be retained, however, for appropriate action upon a hearing if the City should pursue in the future conduct which the Court should find to be contrary to the principles herein expressed.

HARRY W. WELLFORD
United States District Judge

Date:

A True Copy.

ATTEST:

W. LLOYD JOHNSON, *Clerk*

By (Illegible) *D.C.*

Order of the United States District Court Granting Preliminary Injunction

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

Civil Action No. C-71-44

WEST TENNESSEE ACLU, *et al.*,

Plaintiffs,

—v.—

CITY OF MEMPHIS, *et al.*,

Defendants.

ORDER GRANTING INJUNCTION PROHIBITING USE OF CITY HALL OFFICE SPACE BY "MEMPHIANS FOR PATRIOTISM"

The Court has previously had a hearing on February 12, 1971, upon the complaint and application for an order to show cause why a preliminary injunction should not issue, filed in this cause on January 28, 1971. Subsequently the Court issued an opinion dated February 19, 1971, which was embodied in a Declaratory Judgment dated February 26, 1971, stating that "the cause is retained for appropriate action upon a hearing if the defendants should pursue conduct in the future which the Court should find contrary to the principle(s) expressed in said opinion". The defendants filed notice of appeal on March 5, 1971.

The defendant City of Memphis, through its Mayor, also a defendant in this cause, has persisted since approximately January 8, 1971, in making certain office space in City Hall available to "Memphians for Patriotism," a non-governmental body, on an exclusive basis, and the Mayor has declined to allow any other group, particularly the plaintiff organizations, to utilize this space. As expressed in our previous opinion, this amounts to a continuing non-authorized use by the City of its principal seat of government, City Hall. It is not for a public or a directly related governmental purpose.

If such space were lawfully to be made available by the defendants to a group such as "Memphians for Patriotism", it must be done without unjust discrimination as regards other similarly situated organizations, and under the constitutional requirement of "equal protection of the laws" under appropriate rules and regulations. The failure of the defendants to adhere to these standards and requirements over a period of months, leads the Court to conclude reluctantly that it should enjoin such continued use, which is felt not only to be unlawful but in contravention of the constitutional rights asserted in the complaint under such circumstances.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, for the reasons herein stated, that the defendants, City of Memphis, and Mayor Henry Loeb, be and they are hereby enjoined, pending any contrary direction of the United States Court of Appeals, from allowing "Memphians for Patriotism" or any other similarly situated organization continued use of City Hall as office space, or for other like purposes.

Let this Order be made a part of the record in this cause for purposes of the appeal herein filed by the defendants.

HARRY W. WELLFORD
United States District Judge

Date:

Certified True Copy

W. LLOYD JOHNSON, *Clerk*

By (Illegible)
Deputy Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

WEST TENNESSEE ACLU, ET AL.,
Petitioners,

vs.

CITY OF MEMPHIS, TENNESSEE and
HENRY LOEB, Mayor,
Respondents.

REPLY BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

1. Whether the Mayor of Memphis needs special legislative authority expressly giving him the right to make available on a temporary basis unused office space in City Hall to a non-governmental general welfare corporation as a part of a public service program.

2. Whether the City's refusal to grant City Hall office space to a draft counseling service, where another group is using the space for a purpose designated by the Mayor as being patriotic, deprives the petitioners of any constitutionally protected rights.

STATEMENT OF THE CASE

The statement of the case set out by the petitioners is satisfactory with the following exceptions:

1. The impression might be gained from the statement of the case of the petitioners that there was a general use of "available space" under the Mayor's program. In fact, the space was one small vacant office. In the event it was needed at any time for city business, it would have been vacated promptly. The space was constricted and the use was temporary.

2. The character of the use or occupancy was such as would accord with a use to celebrate the birthday of Robert E. Lee, or the anniversary of the founding of the American Civil Liberties Union, or an industrial or art exhibit.

3. The Mayor invited members of the public generally to assist and participate in his program which was headquartered in the City Hall space. The basic objective of the program was to aid in a nationwide drive for return of prisoners of war. The Mayor rejected the request of the draft counseling service to use the office space on the ground that it was inconsistent with his conception of his program and its patriotic nature.

BRIEF

In this case, although three written opinions have been rendered, it has not at any point been adjudicated that the petitioners are entitled to the use of the office space in the Memphis City Hall as a matter of right under the First or Fourteenth Amendments. The strongest indication the District Court made in this respect is set out in the order of April 21, 1972 granting the injunction, in which it was stated in part:

"If such space were lawfully to be made available by the defendants to a group such as 'Memphians for Patriotism', it must be done without unjust discrimination as regards other similarly situated organizations, and under the constitutional requirement of 'equal protection of the laws' under appropriate rules and regulations."

On the other hand, in the original opinion of February 19, 1971 the District Court specifically ruled, under what is presumably to be regarded as the law of the State of Tennessee, that the Mayor of Memphis cannot make unused City Hall office space temporarily available to any organization which does not have a "public" or "governmental" purpose without special legislative authority. This is an uncertain declaration of state law at best.

This issue, which is clearly one of local law and involves the charter authority of the Mayor in the operation and management of municipal property, was not raised in the complaint. The charges made in the complaint related to the deprivation of constitutionally protected rights, and with these charges the District Court did not come to grips either in its opinion of February 19, 1971 or its opinion and order of April 21, 1971.

The Court of Appeals considered the issue a purely local one and dismissed the action under the doctrine of abstention.

It is respectfully pointed out that the Court of Appeals properly applied the doctrine of abstention. The respondents have no quarrel with the authorities cited in the petition bearing upon the doctrine of abstention. It is true that the ruling at the District Court level was apparently based upon the common law, uncertain and erroneous as that ruling may have been, but the key proposition at issue

in this case is the executive authority of the Mayor *under the provisions of a legislative enactment.* This legislative enactment is Section 4 of the Home Rule Amendment to the Charter of the City of Memphis.

Authority of Mayor

The Mayor of Memphis is the chief executive officer of the City of Memphis as set out in Section 4 of the Home Rule Amendment to the Charter:

> Be it further ordained, That the Chief Executive Officer of the City of Memphis shall be the Mayor, who shall be vested with and exercise the executive and administrative power of the City, shall be authorized to administer, supervise and control all divisions, boards, agencies, offices and employees of the City and shall see that the ordinances and provisions of the Charter are observed, except as otherwise specifically provided. Such administration shall be conducted by and through divisional directors under the supervision and control of the Mayor, as provided herein. He shall devote his entire time and attention to the duties of his office.

In this case the Mayor did not lease the small unused office space to Memphians for Patriotism, nor did he in any way grant them an interest in the property. They were using the space at sufferance, temporarily, and as an incident of the Mayor's public service program. The testimony at the initial hearing was specific in this respect:

> "Q. Now, Mayor Loeb, this availability of city hall office space that you have given this group is a temporary availability, isn't that true?
> A. Yes, sir.
> Q. They have no lease?
> A. No. None.

Q. They have no property rights in the property? Isn't that correct?

A. Right."

Accordingly, the judgment of the District Court to the effect that the Mayor needed special legislative authority in order to make the unused office space temporarily available to the group was not pertinent, whether right or wrong in the abstract, because the District Court based its ruling upon the power of a municipality to *lease* property.

For example, in the opinion of February 19, 1971 the District Court relied upon the case of *Shelby County* v. *Memphis Abstract Co.*, 140 Tenn. 74, 203 SW 339 (1918), in which the Supreme Court of Tennessee held that statutory authority was necessary for certain officials of Shelby County to lease part of their office space to an abstract company, for the reason that a lease vested an interest in the lessees which could be used effectively to deprive the governing authority of access to its own property. No constitutional issues were involved.

It is submitted that a temporary use of City Hall office space by a group assisting the Mayor with a program having a public purpose is one involving purely discretionary authority on the part of the Mayor.

No persons are granted "rights" under such a simple arrangement. There is no vesting of a property interest of any kind. It is a simple participation by citizens in public affairs, embellished by the connotations and emotions evoked by the expression "patriotism."

This is not a case involving municipal property available for so-called First Amendment purposes. The room in City Hall was not being offered for general public use, or public expression, whereby there could be discrimination by one group *vis a vis* another. The group known as

Memphians for Patriotism was a volunteer organization aiding the Mayor in a definite program which in his judgment was a desirable one and within the scope of his obligations and responsibilities as a public official.

In the District Court the petitioners relied essentially upon authorities in which individuals or organizations have been refused the use of an auditorium, or other type of public forum, which had been made available to others but which was denied to them because of personal beliefs or other constitutionally sanctioned rights.

It is not every denial of the free use of public property that involves a constitutional concept. The courts do not provide the answer to every disagreement between citizens or groups, or every act by a public official. Particularly is this true where an elected official in good faith exercises the discretion vested in him by the authority of his office and violates no federally protected rights such as voting, public education, assembly or the like. In such instances the ballot box provides the appropriate remedy.

The rationale is expressed in the case of *State* v. *City of Spokane*, 330 P 2d 718 (Wash. 1958) which involved a petition for a writ of mandamus to compel certain city commissioners to rent a public coliseum to an amateur hockey team. In supporting the action of the commissioners, the Supreme Court ruled:

> "The petitioners urge that the rejection of the application constituted a denial of equal protection of the laws, in contravention of Art. I, S 12, of the state constitution and the fourteenth amendment of the Federal Constitution. Many authorities are cited, but in each of them some substantial right or privilege of the plaintiff had been affected by discriminatory legislation or administrative action. None of them have

any bearing on the question involved in this case. The petitioners are not attacking any law or ordinance affecting their rights or privileges, and they have not attempted to show wherein they have been given, by the constitution or by statute or ordinance, any right or privilege to contract with the city for the use of its auditorium. Neither the statute nor the ordinance requires that all applicants should be treated equally or accepted on a first-come, first-served basis. Equal treatment is physically impossible, owing to the limitations of space and time inherent in the nature of the enterprise. Whether the best interests of the public would be served would depend entirely upon fortuity of the commissioners were given no discretion to reject early applicants. The commissioners were left free to exercise their judgment in selecting the events to be staged in the auditorium because this was the only way in which a well-rounded program, in keeping with the purposes for which the enterprise was undertaken, could be achieved. *If the public is dissatisfied with the policies which the commissioners follow in programing events, it alone has a right to object and it can make its objections felt at the polls.*" (Italics added)

There Is No Constitutional Issue Involved

The petitioners have claimed jurisdiction under 28 USC Section 1343 (3); 42 USC Section 1983; and 28 USC Section 1254 (1). They have not at any point challenged the legality of the Mayor's action under state law or under the charter of the City of Memphis. Further, neither the District Court nor the Court of Appeals has found that the petitioners have any rights under the Constitution of the United States which have been violated. Neverthe-

less, the District Court took jurisdiction of the case and made a ruling on what is purely and intimately a question of local law.

The petitioners themselves do not in their brief appear to make such a point. Rather, on Page 11, they make a general reference to "flagrantly lawless official conduct" and cite a totally inapplicable case.

Recent decisions of this Court have upheld the concept that it is not the purpose of the federal court system to resolve issues involving purely local law, as enunciated by Justice Black in *Karr* v. *Schmidt*, 91 S.Ct. 593 (1971):

> "The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance—the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs."

In *Evans* v. *Abney*, 90 S.Ct. 628 (1970), this Court declined to interfere with a state court determination of Georgia law. The Court stated at page 635:

> "The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations."

CONCLUSION

This is a case in which the District Judge assumed jurisdiction in an apparent effort to require the Mayor of Memphis to act upon a controversial executive matter in such a way as to conform to what amounted to the District Judge's difference of view with the Mayor as to the appropriate exercise of administrative judgment and authority.

The only relief sought in the complaint was an injunction requiring the Mayor to permit the draft counseling service and the Reverend Mr. Moon to occupy the City Hall space as a matter of constitutional right. The District Court circumvented the gist of the complaint and filed an opinion setting out the Court's version of the local law with respect to *leasing* of municipal property.

Under the circumstances of this case, which have long been moot, there is no basis for a showing that any of the petitioners have a constitutional right to use City Hall office space. Jurisdiction, should it attach at any point, could only be for the purpose of dismissing the complaint.

It is accordingly respectfully submitted that the petition for a writ of certiorari should be denied.

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August 3, 1972